IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5206

HARRY ROBERTS,

Petitioner,

v.

LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF LOUISIANA

BRIEF OF ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUE CURIAE* IN SUPPORT OF RESPONDENT

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Statement of Interest of Amicus State of New York

As the chief legal officer of the State of New York (N.Y. Executive Law § 63) and under a lawful duty to defend the constitutionality of New York Statutes (See N.Y. Executive Law, § 71), the Attorney General is concerned with maintaining an equitable balance between effective law enforcement to protect society against crime and the observance of individual liberties and rights in the administration of criminal justice. In the context of the instant case, the specific interest of the Attorney General and the State of New York is most germane, as will be seen since New York, in 1974, enacted new laws defining murder in the first degree and the punishment therefor—namely a mandatory

death penalty in very narrow and extremely limited circumstances. This was part of New York's response to this Court's decision in *Furman* v. *Georgia*, 408 U.S. 238 (1972), the total response being both judicial and legislative.

Judicially, New York's highest court, the Court of Appeals, on constraint of *Furman, supra,* declared unconstitutional New York's former Penal Law (§§ 125.35 and 125.30) which defined murder, and provided for a bifurcated proceeding before a jury, which, in its discretion, could report its agreement to inflict the death penalty. The case was *People* v. *Fitzpatrick*, 32 N Y 2d 499 (1973), which had been pending on appeal (but not perfected) when this Court decided *Furman, supra.* Fitzpatrick had shot and killed two police officers while fleeing from an armed robbery of a gas station. The former statute, under which he had been convicted limited the possible infliction of the death penalty to the intentional killing of a police officer, or to the killing of an officer during a felony or to a murder in prison by a life term prisoner. All other murders were subject to from 15 years to life imprisonment (former Penal Law § 70.00[2, 3, a]). The State's Petition for Certiorari to this Court was denied, *sub nom. New York* v. *Fitzpatrick*, 414 U.S. 1033 (1973).

New York's 1974 legislative (L. 1974, c. 367) response to *Furman* is found in the current New York Penal Law and takes the following form:

§ 125.27 Murder in the first degree

A Person is guilty of murder in the first degree when

1. With intent to cause the death of another person, he causes the death of such person; and

(a) Either:

(i) the victim was a police officer as defined in subdivision 34 of Section 1.20 of the criminal procedure law who was killed in the course of performing his official duties, and the defendant knew or reasonably should have known that the victim was a police officer; or

(ii) the victim was an employee of a state correctional institution or was an employee of a local correctional facility as defined in subdivision two of section forty of the correction law, who was killed in the course of performing his official duties, and the defendant knew or reasonably should have known that the victim was an employee of a state correctional institution or a local correctional facility; or

(iii) at the time of the commission of the crime, the defendant was confined in a state correctional institution, or was otherwise in custody upon a sentence for the term of his natural life, or upon a sentence commuted to one of natural life, or upon a sentence for an indeterminate term the minimum of which was at least fifteen years and the maximum of which was natural life, or at the time of the commission of the crime, the defendant had escaped from such confinement or custody and had not yet been returned to such confinement or custody; and

(b) The defendant was more than eighteen years old at the time of the commission of the crime.

2. In any prosecution under subdivision one, it is an affirmative defense that:

(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime except murder in the second degree; or

(b) The defendant's conduct consisted of causing or aiding, without the use of duress or deception, another person to commit suicide. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the second degree or any other crime except murder in the second degree.

Murder in the first degree is a class A-I felony."

"§ 60.06 Authorized disposition; murder in the first degree

When a person is convicted of murder in the first degree as defined in section 125.27, the court shall sentence the defendant to death."

All other murders in New York are defined as murder in the second degree (Penal Law § 125.25) and are punishable by indeterminate sentences, the minimum of which "shall be not less than fifteen years nor more than twenty-five years" and the maximum of which "shall be life imprisonment * * *." (Penal Law § 70.00 [1, 2-a, 3-a-i]).

Since those enactments, this Court handed down five major opinions on July 2, 1976, dealing with the constitutionality, per se, of the death penalty and the constitutionality of its imposition. (*Gregg* v. *Georgia,* 428 U.S. —— 49 L. Ed. 2d 859; *Proffitt* v. *Florida,* 428 U.S. ——, 49 L. Ed. 2d 913; *Jurek* v. *Texas,* 428 U.S. ——, 49 L. Ed. 2d 929; *Woodson and Waxton* v. *North Carolina,* 428 U.S. ——, 49 L. Ed. 2d 944; and, *Roberts* v. *Louisiana,* 428 U.S. ——, 49 L. Ed. 2d 974).

Following on July 6, 1976, this Court, in a large number of memorandum cases (428 U.S. ——, 49 L. Ed. 2d 1205 et seq.), remanded for further proceedings 34 death cases to North Carolina; 3 death cases to Louisiana (pp. 1212-1213, *supra*); and 6 death cases to Oklahoma (pp. 1214-1215, *supra*).

One of the Oklahoma cases so remanded to the Court of Criminal Appeals of Oklahoma was *Green* v. *Oklahoma* (428 U.S. ——, 49 L. Ed. 2d 1214, No. 75-6451, reversing 542 P. 2d 551 [1975]). The Oklahoma statute at issue involved ten different categories of homicide subject to the death penalty. Green killed a police officer.

So too, presumably because of the broad North Carolina statute nullified in *Woodson, supra,* another killer of a police officer (Chief Lashly) was saved (*Sparks* v. *North Carolina,* 428 U.S. ——, 49 L. Ed. 2d 1212, No. 74-669, 7/6/76, reversing 285 N.C. 631, 207 S.E. 2d 712 [1974]).

Another Louisiana case remanded on July 6, 1976 by this Court was *Washington* v. *Louisiana* (428 U.S. ——, 49 L. Ed. 2d 1213, Case No. 75-6123, reh'g den 10/4/76, 45 U.S. L.W. 382 [10/12/76]). Washington had been convicted under the five category mandatory Louisiana death statute for the intentional killing of "a peace officer who was engaged in the performance of his lawful duties", by shooting the victim in the back, the victim being Deputy Sheriff James Allen Arterbury of St. Charles Parish (See: *State* v. *Washington,* 321 So. 2d 763 [La. 1974]).

Clearly, as a result of this Court's actions, *supra,* New York's mandatory death penalty statute has been placed in doubt, some of our New York courts conflicting with one another in cases involving the killing of police officers.

Thus, Justice McQuillan (Criminal Trial Term, Supreme Court of the State of New York, New York County, in *People* v. *Joseph Velez* [not officially reported, but reported on October 26, 1976 in the New York Law Journal, pp. 12-14, cols. 4, 5, 6 and 1]) held New York Penal Law § 60.06, *supra,* unconstitutional on what the Justice believed to be the constraint of *Woodson, supra* and *Roberts, supra*— that a mandatory death penalty statute was unconstitutional.

On the other hand, Justice Rinaldi (Kings County, Criminal Trial Term) rejected defendant's similar constitu-

tional challenge to the death penalty and imposed the death sentence on November 22, 1976 in *People* v. *Joseph James* (not reported) the sentence being stayed pending a direct appeal to the Court of Appeals of the State of New York, the State's highest Court.

So too, in another case before Justice Roberts in New York County Supreme Court, involving another defendant, also named Velez (approximately a week prior to Justice McQuillan's decision, *supra*), the local New York City media advised the Court approved a plea to Murder, Second Degree, in satisfaction of charges that the defendant had killed two police officers (Murder, First Degree). It was reported that primarily due to fears the death penalty statute would be held unconstitutional, and, hence might require a new trial, amongst other legal difficulties, the District Attorney felt constrained to recommend the plea with its accompanying lengthy sentence.

Furthermore, there is also now awaiting argument before New York's Court of Appeals, a direct appeal in the case of *People* v. *Joseph Davis,* in which the New York statutes, *supra,* are being challenged, primarily upon this Court's recent decisions, *supra.* The Attorney General has intervened in such appeal, pursuant to Executive Law § 71 and has submitted his brief in support of the New York statutory scheme. Thus, New York's interest in the instant case is immediate.

ARGUMENT

The imposition and carrying out of a mandatory sentence of death for the crime of first degree murder of a police officer under the Law of Louisiana is non-violative of the Eighth and Fourteenth Amendments to the Constitution of the United States.

1. In General

In the Attorney General's view, the majority of this Court has decided that the concept of capital punishment, per se, and the imposition of the death penalty under all circumstances are not unconstitutional or violative of the Eighth and Fourteenth Amendments. (*Gregg* v. *Georgia, Proffitt* v. *Florida, Jurek* v. *Texas, Woodson* v. *North Carolina* and *Roberts* v. *Louisiana, supra*).

"The issue, like that in *Furman,* involves the procedure employed by the State to select persons for the unique and irreversible penalty of death." (*Woodson, supra,* at p. 951).

So too, after a careful reading of *Woodson, supra* and *Roberts, supra, inter alia,* the Attorney General submits it is clear that at this time it cannot be said that all mandatory death sentences are, per se, unconstitutional and violative of the federal standards. To hold otherwise would too broadly interpret the recent opinions of this Court.

Therefore, we first turn to the actions and words of this Court from July, 1976 to and including the recent limited grant of certiorari (11/30/76) in this case, *Harry Roberts* v. *Louisiana,* to aid us in better framing our question and arriving at a reasonable evaluation of a mandatory death penalty for the killing of a police officer.

Support for New York's position is found in the very circumstances, opinions or summary dispositions depicted

in *Woodson, S. Roberts, Green* v. *Oklahoma,* and *Harry Roberts, supra.* Analysis of these cases, in our opinion, shows the Court was generally dealing with what it perceived to be broad, sweeping and all encompassing mandatory condemnations in the particular cases then before it.

Thus, examination of the statutes of North Carolina, Louisiana and Oklahoma applicable to the *Woodson, Roberts* and *Green,* decisions, *supra* (*Woodson,* at p. 950; *Roberts* at pp. 979-980) depicts the broad overreach of homicidal categories punishable by death under the respective laws of especially North Carolina and Oklahoma.

Further indication that this Court did not intend to bar all mandatory death penalty statutes is seen at almost the very beginning of *Woodson,* (p. 951) where, the court, after characterizing North Carolina statutes as encompassing, "a broad category of homicidal offenses," in footnote 7, stated:

> *"This case does not involve a mandatory death penalty statute limited to an extremely narrow category of homicide,* such as murder by a prisoner, serving a life sentence, defined in large part in terms of the character or record of the offender. We thus express no opinion regarding the constitutionality of such a statute. See n. 25, *infra."* (Emphasis added)

While the specific example given in the footnote alludes to a murder in a prison, as we read it, there is no exclusion of "an extremely narrow category of homicide", such as murder of a police officer engaged in the performance of his duties. The specific footnote example, *supra,* is, in our view, just that—an example, without limitation or exclusion of another "extremely narrow category of homicide."

The plurality opinion in *Woodson, supra,* at pp. 954-955, n. 25, further amplified upon the example given in footnote 7 as follows:

> "The only category of mandatory death sentence statutes that appears to have had any relevance to the actual administration of the death penalty in the years preceding Furman concerned the crimes of murder or assault with a deadly weapon by a life-term prisoner. Statutes of this type apparently existed in five States in 1964. In 1970, only five of the more than 550 prisoners under death sentence across the country had been sentenced under a mandatory death penalty statute. Those prisoners had all been convicted under the California statute applicable to assaults by life-term prisoners. *We have no occasion in this case to examine the constitutionality of mandatory death sentence statutes applicable to prisoners serving life sentences."* (Citations omitted, Emphasis added)

Similarly, in *Roberts* v. *Louisiana, supra,* at p. 982, n. 9, there is language, in our view, to the effect that certain specific categories of mandatory death sentence can be constitutional. The court said:

> "Only the third category of the Louisiana first-degree murder statute, covering intentional killing by a person previously convicted of an unrelated murder, defines the capital crime at least in significant part in terms of the character or record of the individual offender. *Although even this narrow category does not permit the jury to consider possible mitigating factors, a prisoner serving a life sentence presents a unique problem that may justify said laws . . ."* (Citations omitted—emphasis added)

The intention of the plurality to not vitiate every mandatory death penalty category was briefly alluded to by Justice Rehnquist in his *Woodson* dissent (p. 971) wherein

he contrasted Part III-A with Part III-C of the plurality opinion.

Important in the *Roberts* dissent is Justice White's view of whether the plurality intended to invalidate all mandatory death penalty categories. His answer is consistent with the Attorney General's instant position. The plurality really did not so intend, the Justice saying:

> "Although the plurality seemingly makes an unlimited pronouncement, it actually stops short in invalidating any statute making death the required punishment for any crime whatsoever. *Apparently there are some crimes for which the plurality in its infinite wisdom will permit the State to require the death sentence to be imposed without the additional procedures* which its opinion seems to mandate. There have always been mandatory death penalties for at least some crimes, and the legislatures of at least two States have now again embraced this approach in order to serve what they deem to be their own penological goals." (*Roberts, supra,* at p. 996—Emphasis added)

We can only surmise (rightly or wrongly), the reason for this Court's summary dispositions on July 6, 1976 of three specific police murder cases (*Sparks, supra* from North Carolina; *Washington, supra,* from Louisiana; *Green, supra,* from Oklahoma), amongst the host of other murder cases summarily vacated that day, was because of the Court's generic overview of the very broad particular statutes before it. There is no indication in the Court's summary dispositions that it analyzed in depth the three cases involving the murdered policemen as it had done with respect to *Woodson* and *Roberts.* A logical answer is that those three cases, amongst many, were vacated as incident to the Court's striking entire, particular and specific statutes.

A fortiori, it logically follows that if this Court really intended to strike every mandatory death penalty category, including those proscribing the killing of police officers, it would have found no need (45 U.S.L.W. 3399, Nov. 30, 1976) to grant certiorari to Harry Roberts, herein (No. 76-5206) and limit the grant therein to the question:

> "Whether the imposition and carrying out of the sentence of death for the crime of first degree murder of a police officer under the law of Louisiana violates the Eighth and Fourteenth Amendments to the Constitution of the United States."

Accordingly, it seems this Court is specifically examining, the constitutionality of mandatory death sentences for first-degree murder of a police officer ". . . an extremely narrow category of homicide" which "presents a unique problem that may justify such a law."

2. The Recent New York experience bearing on the Issue

The present §§ 125.27 and 60.06 of the Penal Law, *supra* (L. 1974, c. 367) were New York's Legislature answer to the dilemma created by *Furman* as applied in *Fitzpatrick, supra*. The Practice Commentary by Hechtman, under § 60.06, *supra* (p. 160, McKinney's New York Penal Law, Book 39), in part, advises that:

> "T' is section was newly added as part of the revision of the penalties for the crime of murder. . . . That crime has been split into two degrees (§§ 125.25 and 125.27) with the first degree (§ 125.27) carrying the mandatory death penalty. . . .
>
> The instant amendment, therefore, in *mandating the death penalty* for those convicted of murder under prescribed circumstances seeks to follow what is perceived as a constitutionally acceptable course...." (Emphasis added)

This new statutory scheme was not lightly arrived at. In his letter of May 14, 1974 to the Governor's counsel concerning A. 11474-A (Senate Reprint 21028), Assemblyman Volker, one of the Bill's many sponsors, sought to give ". . . the benefit of some of the bakcground research which went into the preparation of this legislation." Volker advised that:

> ". . . (I)n December 1973, the Assembly Codes Committee held a well-attended public hearing on the issue of capital punishment. After examination of the testimony given and other supplementary materials, it was determined that the surest method to provide New York State with a constitutional death penalty was to provide a mandatory death sentence for specific and carefully defined cases. This would establish a legislative determination that these crimes could only be deterred by the death penalty. The alternative was to provide specific and detailed standards for juries to follow in determining whether a death sentence should be imposed. This approach was rejected as one which would not in fact eliminate the capricious, wanton and freakish imposition of the penalty which was the basis for Justices Stewart's and White's opinions in the *Furman* case. It was felt that detailing mitigating circumstances such as impaired capacity to appreciate wrongfulness of conduct, substantial duress and minor participation, or aggravated circumstances such as prior convictions, commission in a heinous, cruel or depraved manner, would merely give the jury the opportunity to exercise the same broad discretion they now exercise with none of these sentencing criteria set forth in the law . . . ." (N.Y. State Legislative Library, Bill Jacket 11474-A, SR-21028, document numbered pp. 51-53).

After explaining the provisions and theory of the bill (including the affirmative defenses thereto) and the various sections thereof, the letter concluded, saying:

> "I believe that enactment of this legislation is at least a partial answer to the continuing spread of violent crime in the State of New York. I also feel that the death penalty will serve as a *deterrent in the carefully limited situations which are set forth in the bill* . . . ." (Emphasis added)

Further indication of the basis for the restoration of the death penalty by New York can be found in the slip opinion of Justice McQuillan in *People* v. *Velez, supra* (See: pp.25-30). At pp. 26-27, former Governor Rockefeller is quoted as saying on June 20, 1973:

> "I am deeply concerned that the *deterrent provided by the death penalty for the murder of peace officers* . . . has been undermined by a recent decision of the State Court of Appeals which in effect nullified this State law. In the *interests of deterring such crimes* it is vital that the death penalty be retained in such cases. This decision was based on an interpretation by the State Court of Appeals of a U.S. Supreme Court decision, holding that the discretion permitted under State law as to application of the death penalty rendered it a cruel and unusual punishment. I have been advised that the issue arising from the Court of Appeals decision is expected to be carried on appeal to the U.S. Supreme Court. If the Nation's highest court reverses the Appeals Court decision, no further action will be necessary. If, however, the Supreme Court upholds the State Court, I plan to offer legislation at the next session of the Legislature which would eliminate the discretionary nature of the death penalty and thus restore the penalty as to the murder of peace officers and prison guards." (Emphasis added)

Additional reasons for the adoption of the New York 1974 Death Penalty Statute, *supra*, are set forth at pp. 27-

29 of the *Velez* slip opinion, which, after setting forth the denial of certiorari on November 12, 1973 in *Fitzpatrick*, stated:

> ". . . (A) week later, a commentator made this observation: Proponents of capital punishment now contend that the capricious quality in the law was the fact that the death penalty was optional. But make it mandatory to execute police murders and it will pass constitutional muster, they say, as they prepare to launch their campaign next month at a legislative hearing (Clines, Death Penalty—seeking a Reprive in Albany, The New York Times, November 18, 1973).
>
> In December, 1973 the Assembly Codes Committee held hearings on death penalty proposals (see New York Law Journal, December 7, 1973; see The New York Times, December 9, 1973, 'Hearing is Held on Death Penalty': '[A] number of lawmakers have expressed the view that it was the optional, and therefore inherently arbitrary nature of the death penalty that the courts objected to, and that if capital punishment were mandatory for certain kinds of murder the penalty would be found constitutional . . . Governor Rockefeller has said he would sign a bill making capital punishment mandatory for the murder of peace officers). . . .
>
> ". . . (A) committee of the state attorneys general organization reported last December that it considered 'a mandatory death penalty for specified offenses' as the alternative most likely to 'withstand constitutional attack.'"

Prior to *Furman, supra* and the 1974 revision of the New York Death Penalty, New York, in 1965 and 1966 had limited the possible imposition of the death penalty to intentional killings of peace officers, or where the killer had been serving a life sentence. The killing of a peace

officer in the course of a felony was also included in that category.

After the 1967 revision of New York Penal Law which continued the basic categories of murder which could be punishable by death, one amendment, *inter alia,* was made thereto.

A 1971 amendment (L. 1971, c. 1205) to the former Penal Law enlarged the category of murders subject to the death penalty after a bifurcated sentence proceeding. The amendment added that if ". . . the victim was an employee of a local jail, penitentiary or correctional institution performing his official duties . . .," the court should conduct the bifurcated sentence proceeding.

Interestingly, the legislative bill jacket (L. 1971, c. 1205) pertaining to this amendment and on file at the N.Y. State Legislative Library (Document No. 2-3, Assembly Bill 750-c), contains *inter alia,* a letter from its sponsor, Assemblyman Riford, dated June 17, 1971, to Governor's counsel. It stated, in part:

> ". . . (t)he reason for this bill was brought out in the disturbance at the Auburn Correctional Facility on November 4, 1970. A number of hostages were taken by the inmates, some civilian and some guards. The inmates made known their knowledge that if a guard was killed the murderer could receive the death penalty, but if they killed a civilian the maximum penalty was life imprisonment. . . ."

Continuing, the letter further indicated it was the Assemblyman's belief "that the existing law is a clear invitation to an inmate who is disposed to kill. . . ." Concluding, it set forth:

> "The civilian employees, the teachers, clergymen and others serving the facility, *are in the same hazard situation as the guards.* They deserve the same

protection under the law that the guards are afforded. . . .'' (Emphasis added).

Agreeing with these thoughts, Counsel to the Department of Correctional Services, by letter dated June 24, 1971 (also contained in said jacket and marked document #4) recommended approval of the bill, stating, *inter alia:*

> ''This is a good bill. There should be no distinction made between uniformed personnel and civilian employees in correctional institutions. *Both groups are exposed and equally susceptible to violence and possible death.* While the present law *protects* the peace officer, it leaves the civilian employee unprotected and vulnerable to injury or death. Such persons might easily be held as hostages, or become victims of violence or death in a correctional setting.'' (Emphasis added)

Of equal relevance to the instant case are other documents which led to the enactment of the predecessor murder statutes in New York and which protected the likes of policemen and correctional employees.

Thus, contained in Legislative Document No. 25 (1965) (''Fourth Interim Report of the State of New York Temporary Commission on Revision of the Penal Law and Criminal Code—February 1, 1965'') is a ''Special Report on Capital Punishment'' (pp. 63-100). Within that Special Report is a two page majority statement recommending the abolition of capital punishment and a nine page minority report (pp. 71-78) together with a staff report and twenty-one page appendix, the minority recommending its retention, at least in part.

However, of importance are many comments and statistics contained within the minority and staff reports, *supra.* A few of these comments say that: 1. ''(t)here is more crime in the State of New York than anywhere else in the world'' (p. 75, *supra*); 2. ''(A)t a time when, by all accounts, the state is constantly losing ground in the war against crime in the streets, it would seem not only wise but absolutely necessary to focus our concern not so much on the criminal who refuses to recognize the sanctity of human life but on the law enforcement officials whose duty it is to protect life and in the overriding question of the protection of society itself'' (id.).

Also important are remarks in that Staff Report (at pp. 89-90) regarding the opinion of a vast majority of police officers ''. . . that the death penalty is the only effective deterrent to homicide in general and to the killing of police in particular.'' The report then quoted testimony given at a Public hearing in which the witness declared:

> '' 'I can report to you that those who have had actual contact with homicides and potential homicides do believe that there is a deterrent effect, and they don't base this on any statistical consideration at all. They base it purely on private interviews with criminals and potential criminals who have reported this to them.' ''

In the same vein, and most importantly are telling comments by the International Conference of Police Associations in support of New York's Current Law.

There is found in the 1974 Bill Jacket in the Legislative Library File (marked numbers 56 through 58) a memorandum in support of the adoption of the Bill by the International Conference of Police Associations. That memorandum, not only pointed out the frightening statistical increase in crimes effecting human life, but stated, in part:

> ''. . . the same statistics show us the horrible off shoot of such a breakdown in the morals of our society. *In 1966, 57 police officers were killed in the performance of their duties; in 1967, there were 76; 1968, 64; 1969, 86; 1970, 100; 1971, 126; 1972, 112; and in*

1973, 134. As you can see, the number of police officers killed in the performance of their duty has more than doubled in the last eight years. . . ." (Emphasis added)

". . . (t)he primary duty of the policeman is enforcement of laws enacted by you as legislators. In that role, the police walk constantly among criminals some of whom are chronic repeaters and some of whom are the toughest, most hardened miscreants in our society. Police officers . . . know, from the synthesis of their total experience, that lurking behind even the toughest facade is often a deep seated fear of that terrifying punishment and they know that sometimes the specter of that fear will stay a trigger finger at the critical moment. . . ." (id).

". . .(t)hink of the correctional officers who have been killed in the riots inside our penitentiaries, killed by murders who were sentenced to jail rather than the gas chamber or electric chair . . . ." (id).

This memorandum, while commenting upon critics who opposed the death penalty in the past, theorized that the lack of concern for a murdered policeman was wrongfully excused by those opponents who rationalized this was part of the policeman's job. "What they fail to take into consideration is their responsibility to do everything possible to make the job of being a policeman as safe as they possibly can. They worry about families of the killer, but shed no tears for the families of the dead officer." (id).

Thus, New York, like other states has shown a deep and continuing concern for the police officer and correctional person in order to offset the effect upon society which takes place when such officers or personnel are killed in the line of duty.

We submit a legislature, through its continued inclusion of the police (peace) officer in the class of those whose

murders could trigger the mandatory death penalty, evinces great rationality in providing for the ultimate punishment of the perpetrators. It could validly consider that the police (peace) officer is the *symbol* of our organized and civilized society and the bulwark holding the front line against the forces of anarchy and lawlessness.

It could also evaluate the facts that no one in our society could lay greater claim to being the protector of society than the policeman; that law enforcement groups and agencies are daily concerned with and exposed to the everyday problems in the constant war against crime.

3. The Mandatory Death Penalty for the Murder of a Police Officer is Constitutionally valid

In the Attorney General's view, the "narrow category" of the killing of a police officer engaged in his duties also presents a "unique problem that may justify such a law." And, as will be seen, *infra,* because of circumstances or the specific language within a statutory scheme it can be deduced that a finding of guilt of first-degree murder for the killing of a police officer implicitly indicates the consideration of at least one mitigating factor.

The clearest and possibly easiest, example of such characterizations, is the "lifer" who kills a correctional person. As some of the members of the Court have indicated in *Woodson,* and *Roberts, supra,* this is considered both a "narrow category" of homicide and depicts a "unique problem" which may very well justify the mandatory law. Some of the reasons given for this view include, without limitation, the fact that such a crime, by its description and definition, demonstrates the character or record of the perpetrator.

What is not there stressed or said about that "narrow category" are the obvious facts that the protection of the correctional officers and the deterrence of such crimes are absolute musts. Without such considerations, and manda-

tory penalty, the miscreant felons of society could kill anyone at will, never having to fear the infliction of the death penalty, or the imposition of any, additional or significant punishment.

Equally narrow a category of homicide and also presenting a "unique problem" is the situation concerning the police officer. Like the correctional person, he, too, is vulnerable and exposed to violence and possible death, we daresay, even more so. The difference between the policeman and the correctional guard in this regard is the setting in which the policeman works (vis-a-vis the correctional employee). The officer is exposed to the many uncontrolled hazards of external society (as opposed to a controlled environmental society) and it logically seems that he, as the very essence and symbol of an organized society is more of a visible target than a correctional person.

We need only point to the special regard the New York Legislative and Executive Branches have held for the police officer and correction person since, at least 1965, *supra,* by carving out for them special protective status in the application of the homicide laws. This "unique" concept came about and has continued because of the recognition of many diverse factors.

Especially, demonstrative of this *uniqueness* is the memorandum of the International Conference of Police Associations referred to and quoted, in part, *supra.*

The very fact that a person kills a policeman on duty when he knows or should know the officer is a policeman, is a great indicator of the *perpetrator's character, or lack of it,* we should say. Such an act, surely on its face, constitutes one of the most egregious *aggravating* factors one could find or think of. Such a consideration constitutes a proper basis for a legislative finding that a person who so acts is of a *character* that *mandates* the imposition of the *death* penalty.

The only slight difference, as we see it, between the murder of a policeman and the other two narrow categories is the former situation does not on its face bespeak the record of the offender, which, because of the factors set forth, *supra,* should not be absolutely controlling. The act is aggravating and bespeaks the perpetrator's malevolent character.

For example, as we read § 125.27, *supra,* there is built into the statute several mitigating factors. The most obvious of which is that a youth, under 18, can not commit the crime of murder in the first degree, and hence, is not subject to the death penalty. (Contrast this to New York's general rule that youths 16 and over, per Penal Law § 30.00, may be treated as adults for criminal law purposes).

Also built in to the New York overall scheme are opportunities to present recognized defenses as well as the § 125.27 affirmative defenses (i.e., justification, insanity, intoxication PL §§ 30.05; 35.00 et seq.; 15.25). If presented, and the jury's verdict, still returns "guilty", there is obvious indication the jury considered mitigating circumstances, has rejected them and, implicit in the verdict, has found beyond a reasonable doubt, the guilt of the accused and at least *one aggravating factor.*

The fact that in Georgia, the evidence considered at the Guilt stage can suffice, without any resubmission to the sentencing authority (*Gregg* v. *Georgia, supra,* 49 L. Ed. 2d at p. 869) seems most consistent with our argument that in New York, in Louisiana, and maybe elsewhere, evidence of the aggravating or mitigating circumstances is built into the statutes defining murder, first-degree and in other complementary procedural provisions; and, a finding of guilty of first degree murder by the jury implies their consideration of such factors.

We still find possibilities for a Georgia jury to "waffle" on the sentencing issue. The jury need not recommend

death, even though it may have found at least one of the ten statutory aggravating factors. So too, it is not required to find a mitigating circumstance in order to recommend mercy to the Court. The only positive requirement is that it find one statutory aggravating factor in order to recommend death (*Gregg, supra* at p. 188).

Such a constitutionally upheld system seems not to comport with the concerns of the *Furman* plurality, whereas a "narrow" mandatory scheme (regarding the killing of policemen) certainly appears to have almost all other constitutional virtues applauded in this Court's decisions without the many pitfalls or unconstitutional vices therein stated.

Like Georgia, Florida and Texas, Louisiana's and New York's narrow and "unique" Penal Law categories, *supra,* certainly focus attention on the particularized nature of the crime as well as upon the character of the defendant.

When compared to the broad groupings of homicides and the infinite variables of their perpetration and perpetrators in other states, New York's and Louisiana's statutes, by narrowing their group to such *special* and *unique* categories, *supra,* meets the Constitutional requirements set forth by this Court.

To be sure, it is clear this Court has yet to rule that every category of killing a policeman is not so *unique* and, therefore within the condemnation of a broad mandatory system. It also is fair to say this court has indicated that a category, which includes the murder of a correctional employee by a life termer, is *unique* and may justify a mandatory penalty. Since, in our view, *supra,* there is very little difference between that category and the police murder category (at most, a slight degree, if any), such a latter category is also *unique, special* and constitutionally sufficient to justify a mandatory death penalty.

Thus, some of the comments and statements set forth, *supra,* pertaining to the protective needs of correctional personnel could also apply with equal force to police officers. Thus, their exposure and vulnerability is also a rational consideration for the imposition of the mandatory death penalty.

Your *amicus* is aware that a plurality of this Court has indicated a preference for a bifurcated system, in the latter part of which a sentencing authority would consider aggravating and mitigating circumstances surrounding the commission of crimes punishable by death. While this Court may have considered that many murders have been committed because of varying extenuating circumstances, and, therefore, should be considered by a sentencing authority, the Attorney General respectfully submits, for the reasons set forth, *supra,* that these considerations do not and should not apply to the murder of a police officer who, as the symbol of a lawful society, is deserving of its protection. Where a statutory scheme defining this crime deems and thereby incorporates the aggravating nature and factor of such a killing, as well as at least one mitigating factor for consideration on the issue of guilt, the difference between the killing of a police officer, on its face and a different homicide is obvious. Those mitigating concerns, *supra,* realistically are not involved in such a heinous and wanton act.

Accordingly the Louisiana and New York Laws imposing a mandatory death penalty for killing of a police officer (murder-first degree) do not violate the Eighth and Fourteenth Amendments.

CONCLUSION

The imposition and carrying out of a mandatory sentence of death for the crime of first degree murder of a police officer under the Law of Louisiana is non-violative of the Eighth and Fourteenth Amendments to the Constitution of the United States.

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Respectfully submitted,

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